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No. 93-636

In the Supreme Court of the United States.

OCTOBER TERM, 1993

RICHARD WILKINS AND ROLAND SMOTHERMAN,
PETITIONERS

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly sustained the decision of the National Park Service to remove feral horses from the Ozark National Scenic Riverways.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 2a-15a) is reported at 995 F.2d 850. The opinion of the district court (Pet. App. 16a-32a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 15, 1993. A petition for rehearing was denied on July 28, 1993. Pet. App. 1a. The petition for a writ of certiorari was filed on October 21, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 6 of the Ozark National Scenic Riverways Act, Pub. L. No. 88-492, 78 Stat. 608, as amended, 16 U.S.C. 460m-5, states:

> The Ozark National Scenic Riverways shall be administered in accordance with the provisions of [the National Park Service Organic Act of August 25, 1916 (39 Stat. 535 [16 U.S.C. 1, 2-4])], as amended and supplemented, and in accordance with other laws of general application relating to the areas administered and supervised by the Secretary [of the Interior] through the National Park Service; except that authority otherwise available to the Secretary for the conservation and management of natural resources may be utilized to the extent he finds such authority will further the purposes of this Subchapter.

Section 3 of the National Park Service Organic Act of August 25, 1916, 39 Stat. 535, as amended, 16 U.S.C. 3, authorizes the Secretary of the Interior to

> provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said [national] parks, monuments, or reservations.

STATEMENT

1. The Ozark National Scenic Riverways is a National Park occupying a 140-mile strip along the Current and Jacks Fork Rivers in Missouri. Pet. App. 3a. In recent years, approximately 20 horses have freely roamed a 24-mile stretch of the Riverways. These feral horses are believed to be descended from domestic livestock, which escaped from, or were

released by, their owners during the 1940s or 1950s, "before 'open range' ended in Missouri." Pet. App. 20a. In 1985, the Riverways staff of the Park Service prepared a study entitled "Status and Proposed Management of Feral Horse Population." C.A. App. 60-65. The study noted that one horse had been shot by an unknown person in 1982, that crops planted in the Riverways area had been damaged or destroyed by the horses, that the horses had made riverside trails bare and vulnerable to erosion, and that the horses' contact with park visitors posed risks of injury. The study accordingly recommended live trapping and removal of the horses. *Id.* at 64. Thereafter, the Park Service conducted studies and aerial surveys in 1985, 1989 and 1990 "to show the impact the wild horses had on the native fauna and plant communities in the park." Pet. App. 3a.

2. On May 3, 1990, Arthur Sullivan, the Superintendent of the Riverways park, issued a news release (Pet. App. 33a-34a), announcing that the Riverways' staff had been prompted by the concerns of "many area residents" to take steps to protect the horses. The statement noted that the horses had been found to be "ill-equipped to contend with the harsh winters, disease, injury, food shortages and other environmental factors detrimental to their continued well-being," and that there had been "numerous reports of harassment and even shootings" of the horses. The Superintendent observed that "the fact that a larger population [of horses] does not exist bears mute testimony to the extremely high mortality rate." *Id.* at 33a. He also stated that the Riverways staff would consider proposals to remove the horses from the

park or "any reasonable solution to this problem." *Id.* at 34a.

Ensuing protests by neighboring residents (Pet. App. 4a), as well as inquiry from United States Representative Bill Emerson (*id.* at 30a-31a), led to a "thorough review" of the issue by the Park Service. *Id.* at 35a. On February 20, 1991, Acting Assistant Secretary of the Interior Sewell sent Representative Emerson a letter reaffirming the Interior Department's decision to begin removing the horses. *Id.* at 35a-37a. Superintendent Sullivan ultimately selected a plan providing for removal of the horses, and the National Park Service issued a special use permit to a private individual to carry out the plan. C.A. App. 7-8.

3. In February 1991, the National Park Service released an environmental assessment (EA), entitled "Removal of Feral Horses," C.A. App. 39, which summarized past events and studies regarding the horses, *id.* at 44-45, and assessed the alternative solutions to the problem. The removal alternative, known as "Alternative II," was eventually identified as the preferred course.[1] On March 20, 1991, the Regional Director of the National Park Service's Midwest Region made a finding of no significant environmental impact (FONSI) regarding proposed Alternative II, and concluded that no environmental impact statement needed to be prepared before the horses were removed. *Id.* at 40.[2]

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[1] The three rejected alternatives were no action, sterilization, and eradication.

[2] Environmental impact statements are described in Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Environmental assessments and FONSIs are described in regulations of the Council on

4. On February 26, 1991, a group of local citizens filed this action against the Secretary of the Interior, Superintendent Sullivan, and the Park Service's permittee, seeking a permanent injunction against removal of the horses. See C.A. App. 9-14.[3] The complaint alleged that the feral horses had unique historic and scenic importance to the area, and that their removal would cause plaintiffs irreparable harm because the residents would "no longer be able to enjoy the horses as before." *Id.* at 13, 10. The complaint also alleged that removal or destruction of the horses "would violate the enabling statute for the Ozark National Scenic Riverways." *Id.* at 13.

Following a trial on the merits, the district court permanently enjoined removal of the horses. Pet. App. 16a. The court held that review of the Park Service's decision was governed by the "arbitrary and capricious" standard of the Administrative Procedure Act (APA), 5 U.S.C. 706(2)(A). Pet. App. 25a-26a. The court acknowledged that the Secretary of the Interior has authority, under Section 3 of the National Park Service Organic Act of 1916, 16 U.S.C. 3, to destroy or remove the horses if they are "detrimental to the Riverways." Pet. App. 26a-29a. The court also acknowledged that the horses "technically" comprise a species that is exotic to the Riverways area, *id.* at 27a, and that it was the Park Service's announced policy to manage exotic species "up to and including

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Environmental Quality, 40 C.F.R. 1501.7(a)(5), 1508.9, 1508.13. The complaint alleged no violation of NEPA or any NEPA regulation.

[3] The district court entered a temporary restraining order on the day the complaint was filed. *Id.* at 15.

eradication" when "such species threaten park resources or public health" and when "control is prudent and feasible." *Ibid.*

The district court nevertheless set aside the Park Service's decision to remove the horses, concluding that the evidence did not establish that the horses were detrimental to the use of the Riverways Park or that they presented any threat to park resources. Pet. App. 29a. The court discounted as "exaggerated" (*ibid.*) the Park Service's decision documents, exhibits, and evidence showing that the horses posed a threat to resources in the Riverways. The district court also concluded that the Park Service decision was flawed because the Service "failed to consider relevant facts as to whether the horses are a cultural or historical resource" within the meaning of Section 1 of the 1916 Organic Act, 16 U.S.C. 1, or Section 1 of the 1964 Enabling Act, 16 U.S.C. 460m. Pet. App. 30a-32a.

5. a. The court of appeals reversed, with one judge dissenting. Pet. App. 2a-15a. The panel majority held that "[t]he Secretary's decision was an informal agency decision for which the standard of review is to determine if the agency decision was arbitrary and capricious." *Id.* at 6a. The court then held that the district court had improperly applied this standard of review and had impermissibly relied on its own factual findings rather than on the administrative record underlying the Secretary's decision. *Ibid.* The court of appeals found that the administrative record contained sufficient evidence to support the Secretary's decision to remove the horses under the authority granted to him by the 1916 Organic Act. *Id.* at 7a. Specifically, it noted that studies showed that

the horses had trampled 40 to 60 acres of planted crops on lands rented to farmers, posed a threat to native plants, competed directly with native wildlife for forage, and made extensive trails that had, in turn, caused erosion problems. The court concluded that "the Secretary need not wait for further damage to the park before taking action." *Id.* at 7a.

b. In his dissent, Judge Loken objected to the majority's failure to specify which document constituted the final agency decision, noting that the Park Superintendent testified in a deposition that his "decision document" was the May 1990 press release, and not the February 1991 letter to Congressman Emerson. See Pet. App. 9a. Judge Loken also stated that Superintendent Sullivan was wrong in what Judge Loken understood to be the Superintendent's belief that "he was required to remove the horses without any evidence of detrimental impact." *Id.* at 12a. Finally, Judge Loken concluded that there was not adequate evidence in the record of a detrimental impact. *Id.* at 12a-14a. Judge Loken agreed, however, with the majority's decision to vacate the permanent injunction, "because it improperly precludes the agency from revisiting this issue in the future." *Id.* at 15a n.4.

ARGUMENT

Contrary to petitioners' arguments, the court of appeals properly sustained the Secretary's decision to remove the feral horses. Petitioners' case-specific, factual challenges to the court of appeals' decision do not warrant this Court's review.

1. Petitioners contend (Pet. 8-9) that the court of appeals erred in not specifying which document

represented the final agency decision to remove the horses, and in engaging in "post-hoc rationalization" by relying on material accumulated after the agency decision was made. This argument is without merit. Petitioners concede that the decision to remove the feral horses was taken between May 1990 and February 1991. Pet. 8. The court of appeals devoted its decision to reviewing the ample evidence of the horses' destructive potential that had been amassed by the Park Service prior to the 1990 press release.[4] See Pet. App. 3a (noting studies in 1985, 1989 and 1990), 6a-7a (reciting facts from 1985 study). The court of appeals did not indicate that it relied on the 1991 EA or on any other material gathered by the Park Service after May 1990 in upholding the Park Service's decision to remove the horses.[5] Within the pre-1990 record, the court of appeals found sufficient basis for concluding that the agency's action was not arbitrary or capricious. Pet. App. 7a. Thus, even if the May 1990 press release by the Park Superintendent constituted the agency's final decision, this is not a case in which the court upheld the agency's decision on grounds different from those "upon which

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[4] Although the Riverways Superintendent regarded his May 1990 press release as his written decision to remove the horses (C.A. App. 215), local objection subsequently led to a thorough review of the issue and forestalled implementation of final action until the 1991 letter to Representative Emerson confirmed that the horses would be removed. Pet. App. 35a. Another point of decision occurred when the agency selected the individual who would conduct the removal and issued him a special use permit.

[5] The court's findings at Pet. App. 6a-9a, for example, are largely drawn from the 1985 Study. See C.A. App. 62-63.

the record discloses that [the agency's] action was based." *SEC* v. *Chenery Corp.*, 318 U.S. 80, 87 (1943).[6] In any event, the matter thereafter was thoroughly reviewed, and a fresh determination was made at a higher level in the Interior Department, as explained in the February 20, 1991, letter from the Acting Assistant Secretary. See note 4, *supra*.

2. Petitioners also complain (Pet. 8-9) that, because the Park Service failed to identify the precise point in time that it decided to remove the horses, the reviewing court could not know whether the agency decision was based on what petitioners assert was the Park Superintendent's perception that the agency was "under a legal mandate" to remove the horses (see Pet. 8), or whether the decision was a permissible (but not mandatory) exercise of agency discretion. Contrary to petitioners' assertion, neither the May 1990 press release nor the February 1991 letter

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[6] In response to the public's expression of concern, and in spite of the sufficiency of the evidence supporting the 1990 document, the agency chose to conduct an environmental assessment even though none was required. Under Department of the Interior regulations implementing NEPA, environmental assessments are required on "all actions, except those covered by a categorical exclusion." A categorical exclusion exists for the "elimination of exotic species" from a national park. Department of the Interior, Departmental Manual, 516 DM 7, App. 7.4E(6) (1985). "Notwithstanding the [categorical] exclusions * * *, a responsible Departmental or Bureau official may decide to prepare an environmental document." 516 DM 2.3A(4) (1984). Voluntary environmental assessments may be conducted "at any time in order to assist in planning and decisionmaking." 516 DM 3.2B (1984). In this case, the environmental assessment provided a summary of past events and studies regarding the horses.

states that removal of the horses was "mandated" by law, in the sense that the applicable statute left no room for the exercise of judgment by the agency on the basis of an assessment of the factual circumstances. Petitioners' argument turns on subsequent deposition testimony by the Superintendent that, in context, merely describes the application of Park Service policies in the particular context of the feral horses in the Riverways. See Pet. 5-6.

Moreover, it is beside the point whether the agency's action was based on a discretionary judgment that removing the horses was the best course of action, or on a perception that the action was effectively "mandated" under the relevant statute and regulations in light of the environmental studies previously conducted on the horses; the decision to remove the horses would be valid in either event. Park Service regulations explicitly forbid allowing "livestock of any kind" to run at large in a National Park in the absence of contrary statutory requirements, deed reservations, or a Park Service determination that such use of livestock is a "necessary and integral" part of recreation or is "required" to "maintain a historic scene." See 36 C.F.R. 2.60(a) and C.A. App. 45, 63, 76. No statute, regulation, deed reservation, or other provision requires retention of the horses in the Riverways.

In addition, Park Service policy governing exotic species in fact does mandate their removal from National Parks under specified conditions. The exotic horses at issue in this case roam primarily in areas of the Riverways designated as "natural zones." Pet. App. 27a-29a. Under the 1988 Management Policies of the Park Service, the introduction of exotic

species into "natural zones" is generally forbidden. *Id.* at 65a. The same Management Policies *require* that exotic species be managed, up to and including eradication, whenever they "threaten park resources and public health" and whenever such "control is prudent and feasible." *Id.* at 66a. The 1985 feral horse study (C.A. App. 60, 62-63), as well as the 1991 environmental assessment (*id.* at 39, 45-47, 52), concluded that the horses do "threaten" park resources within the meaning of the 1988 Management Policies governing exotic species (*id.* at 46, 52-53, 63).

Thus, any assumption that removal of the horses was effectively required under applicable law would have been proper. *A fortiori*, the record amply supports any discretionary decision by the agency to remove the horses. To the extent the agency had the statutory authority, based on facts in the record, to remove the horses, it does not matter whether the agency perceived its decision as discretionary or mandatory. In either case, the facts in the record "surely indicated the determinative reason for the final action taken." *Camp* v. *Pitts*, 411 U.S. 138, 143 (1973).

3. Petitioners also fault the Park Service for failing to consider whether the horses qualified as "cultural resources" warranting protection and preservation. See Pet. 10-15. Contrary to petitioners' assertion, however, the agency did not arbitrarily fail to consider the importance of the horses as a cultural and historic resource, because the agency's experience did not indicate that there was a need to consider that factor. A survey and extensive discussion of the cultural resources of the Riverways was included in the widely distributed 1982 General

Management Plan for the Riverways (Pet. App. 52a-55a); the Park Service received no comments on that Plan suggesting that the horses should be considered a cultural resource. See also *id.* at 56a-64a. Moreover, the horses were never characterized as historic or cultural resources in studies of the Riverways' resources conducted in compliance with the National Historic Preservation Act, 16 U.S.C. 470. See Pet. App. 59a.[7] Finally, petitioners do not point to any statutes that would elevate the horses to a "historic or cultural resource;" rather, petitioners simply assert (Pet. 13) that residents and neighbors of the Park consider the horses "a part of their heritage." In light of the failure of experts and the public to identify the horses as a true cultural resource of the Riverways, the absence of any mention of that factor by the agency when it decided to remove the horses was not arbitrary and capricious.[8]

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[7] The Riverways Superintendent, Art Sullivan, testified (C.A. App. 226-227) that the feral horses were not included in any prior inventories undertaken by historians and archaeologists to identify the cultural resources of the Riverways. Moreover, in prior public meetings on the Park Service's general management plan for the Riverways, Mr. Sullivan could recall no members of the public recommending that the horses be considered a cultural or historic resource of the Riverways. *Id.* at 230.

[8] Nor is an exotic species, recently introduced into a national *park*, the kind of cultural resource Congress sought to protect in the Wild Free-Roaming Horses and Burros Act of 1971, 16 U.S.C. 1331, upon which petitioners rely (Pet.13). That act allows foraging by horses on certain lands administered by the Forest Service and the Bureau of Land Management, but it has no application to lands managed by the National Park Service. See 16 U.S.C. 1332(b) and (e).

In sum, the court of appeals correctly determined that the agency had "considered the relevant factors and articulated a rational connection between the facts found and the choice made." *Baltimore Gas & Electric Co.* v. *NRDC*, 462 U.S. 87, 105 (1983). Based on the agency's documentation of the damage caused by the horses and the likelihood of future harm to the Park, the court correctly upheld the decision to remove the horses.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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